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No. 07-1434

Supreme Court, U.S.
FILED
JUL 30 2008
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

DIXIE NATIONAL LIFE INSURANCE COMPANY AND NATIONAL FOUNDATION LIFE INSURANCE COMPANY,
Petitioners,

v.

MARTHA WARD, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

C. ALLEN FOSTER
KEVIN E. STERN
GREENBERG TRAURIG, LLP
2101 L St., N.W., Ste. 1000
Washington, D.C. 20037
(202) 331-3100

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 S. Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

J. CALHOUN WATSON
SOWELL GRAY STEPP & LAFFITTE, LLC
1310 Gadsden St.
P.O. Box 11449
Columbia, S.C. 29211
(803) 929-1400

SUSAN E. ENGEL
ELIZABETH M. LOCKE
NATHAN S. MAMMEN
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 879-5000

July 29, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 2

I. The Court Should Grant The Petition, Vacate The Decision Of The Court Of Appeals, And Remand For Consideration Of A New State Law Enacted For The Purpose Of Remedying The Fourth Circuit's Decision 2

II. Ward Cannot Offer Any Plausible Defense Of The Fourth Circuit's Refusal To Defer To The DOI's Well-Reasoned Interpretation Of The Term "Actual Charges." 5

III. The Fourth Circuit's Interpretation Of The Term "Actual Charges" Will Have A Profound National Impact On The Ability Of Insurance Commissions To Regulate The Insurance Industry 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins,
519 U.S. 452 (1997) 8

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 4

Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council,
413 S.E.2d 13 (S.C. 1991) 7

Department of Justice v. City of Chicago,
537 U.S. 1229 (2003) 5

Fernandez-Vargas v. Gonzales,
548 U.S. 30 (2006) 4

Huddleston v. Dwyer,
322 U.S. 232 (1944) 5

Johnson v. Beauty Unlimited Landscape Co.,
No. 4414, 2008 WL 2490449
(S.C. App. June 17, 2008) 7

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 4

Lawrence v. Chater,
516 U.S. 163 (1996) 1, 3

Louisiana v. Hays,
512 U.S. 1230 (1994) 3, 5

TABLE OF AUTHORITIES (Cont.)

Page(s)

Missouri ex rel. Wabash Ry Co. v. Public Serv. Comm'n,
273 U.S. 126 (1927) 5

Sloan v. South Carolina Board of Physical Therapy Examiners,
636 S.E.2d 598 (S.C. 2006) 9

South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control,
610 S.E.2d 482 (S.C. 2005) 7, 8

Stutson v. United States,
516 U.S. 163 (1996) 5

Youngblood v. West Virginia,
547 U.S. 867 (2006) 3

Statutes

15 U.S.C. § 1012 ..... 2, 10

S.C. Code § 38-71-242 ..... 1, 2, 4, 12

S.C. Code Ann. § 38-3-130 8

S.C. Code Ann. § 38-3-200 8

S.C. Code Ann. § 38-61-20(A) 6

INTRODUCTION

Ward ignores the newly enacted S.C. Code § 38-71-242.[1] This new law, enacted on June 4, 2008, is the South Carolina legislature's response to the Fourth Circuit's decision: it repudiates that court's refusal to defer to the South Carolina Department of Insurance (DOI), and it rejects the court's erroneous interpretation of the term "actual charges," as used in specified disease insurance policies. Section 38-71-242 is an "intervening development[]" that strips the Fourth Circuit's decision of any support. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). This Court should issue an order granting the petition, vacating the lower court's decision, and remanding the case to the Fourth Circuit so that it has an opportunity to reconsider its decision in light of the State's new law. Reconsideration will likely change the outcome of this litigation. *See id.*

The equities favor issuance of a GVR order. While the state legislature has attempted to ameliorate the uncertainty that the Fourth Circuit's decision will have for the insurance industry, Ward has challenged below the application of the new law to this case. It clearly does apply, but even if it does not, the Fourth Circuit should reconsider its decision in light of the state legislature's strong response to its decision interpreting state law. Left standing, the Fourth Circuit's decision undermines the role of state insurance regulators and threatens the welfare

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[1] S.C. Code § 38-17-242 (2008) is available at: http://www.scstatehouse.net/sess117_2007-2008/bills/1104.htm (last visited July 29, 2008).

of insureds and the financial stability of the insurance industry in South Carolina and elsewhere. Petitioners respectfully submit that this Court should either grant the petition and consider the Fourth Circuit's decision on the merits, or in the alternative, issue a GVR order in light of S.C. Code § 38-71-242.

ARGUMENT

I. The Court Should Grant The Petition, Vacate The Decision Of The Court Of Appeals, And Remand For Consideration Of A New State Law Enacted For The Purpose Of Remedying The Fourth Circuit's Decision.

The South Carolina legislature has now spoken on the issue presented in this petition. S.C. Code § 38-71-242 reinforces, reiterates, and codifies the DOI's longstanding interpretation of "actual charges" as the amount an insured is legally obligated to pay for services. This law is a clear repudiation of the Fourth Circuit's determination that the DOI's interpretation of an ambiguous term in an insurance policy is not entitled to deference. It is also a reassertion of the State's prerogative under the McCarran-Ferguson Act to regulate the insurance industry in that State. *See* 15 U.S.C. § 1012 (2006).

In light of this "intervening development[]," this Court should issue a GVR order and send the case back to the Fourth Circuit: there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and ... such a

redetermination may determine the ultimate outcome of the litigation ...." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *see also Youngblood v. West Virginia*, 547 U.S. 867, 871 (2006) (Scalia, J., dissenting from a GVR order); *Louisiana v. Hays*, 512 U.S. 1230 (1994).

The new law creates more than a reasonable probability that the Fourth Circuit's decision would not withstand scrutiny on the merits. The Fourth Circuit concluded that the term "actual charges," as used in Ward's policy was patently ambiguous, and therefore should be interpreted in Ward's favor as requiring petitioners and other insurers to pay any amount a provider prints on a bill or invoice, regardless of whether that amount is in excess of the amount the provider intends to accept as payment in full. Section 38-71-242 rejects that definition. It provides that the DOI's well-reasoned interpretation shall be the default definition of "actual charges" whenever that term is left undefined in a specified disease insurance policy.

Ward fails to bring this intervening development to the Court's attention, but she was clearly on notice of the new law: 11 days before filing her opposition brief, Ward filed a brief in the district court arguing that § 38-71-242 does not apply to this case because her policy was issued prior to June 4, 2008. Such a position is manifestly incorrect.

Enacted just six months after the Fourth Circuit issued its decision, § 38-71-242 plainly applies to the unpaid claims pending in this litigation. Pursuant to § 38-71-242(C), "after the effective date of this section [June 4, 2008], an insurer ... shall not pay any claim or benefits based upon an actual charge ... in an amount in excess of the 'actual charge' ... as

defined in this section." This language indicates an unequivocal legislative intent that the new law govern all current and future claim or benefit payments. The law does not apply just to policies issued after the effective date of § 38-71-242; nor does it apply only to claims filed or submitted after the effective date. To the contrary, the plain language of the provision demonstrates its broad applicability to *any* claims not yet paid as of June 4, 2008, including the claims at issue in this litigation.

The South Carolina legislature carefully avoided issues of retroactivity by drafting a law that applies only to claims that have not yet been paid, and only to specified disease insurance policies that do not define the term "actual charges." *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 207 (1988) (rejecting a federal agency's attempt to promulgate retroactive rules that would "recoup sums *previously paid*") (emphasis added). The statute thus imposes only a prospective legal obligation on insurers with respect to outstanding claims. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

Even if a court were to conclude that § 38-71-242 has a retroactive effect, that retroactive effect is entirely permissible. There is nothing improper about § 38-71-242 applying a default definition of "actual charges" to specified disease insurance policies that "do[] not contain an express definition for the term[]." S.C. Code § 38-71-242(B). The Fourth Circuit concluded only that the term "actual charges" was patently ambiguous and, therefore, under state common law rules of contract construction, must be construed in the insured's favor. Ward cannot plausibly argue that § 38-71-242

upset settled expectations, for one can hardly upset expectations in a contractual ambiguity.

These are issues that should be considered on remand by the lower courts. Ward suggests that "the interlocutory nature" of the court of appeals' decision is a "compelling reason to deny review." Opp. at 12. But the interlocutory posture makes a GVR order particularly appropriate, because application of the new law would resolve this litigation. Petitioners have already moved the district court to dismiss this litigation. That motion is pending. But even if the new law is found *not* to apply to this case, it is potentially outcome dispositive, and a GVR order is warranted because § 38-71-242 manifests the state legislature's view that the DOI's interpretation was persuasive and owed deference.

A GVR order in this case would be consistent with the Court's practice to have lower courts consider in the first instance the effect of new laws. *See Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Louisiana*, 512 U.S. 1230; *Missouri ex rel. Wabash Ry Co. v. Public Serv. Comm'n*, 273 U.S. 126, 130-31 (1927). Such an approach is particularly appropriate here due to the potential inequities that would fall on all South Carolina insureds if the Fourth Circuit's decision is allowed to stand, as well as "the special deference owed to state law and state courts in our system of federalism." *Stutson v. United States*, 516 U.S. 163, 179 (1996) (Scalia, J., dissenting from a GVR order); *see also Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

II. Ward Cannot Offer Any Plausible Defense Of The Fourth Circuit's Refusal To Defer To The DOI's Well-Reasoned

Interpretation Of The Term "Actual Charges."

Ignoring the new law, Ward defends the Fourth Circuit's decision by arguing that the lower court correctly interpreted South Carolina law and properly refused to defer to the DOI's interpretation of "actual charges." Even apart from § 38-71-242, Ward's argument has no merit. The interpretation of insurance policy provisions is among the most fundamental responsibilities of a state insurance commission, as the amicus briefs submitted by the DOI and the National Association of Insurance Commissioners make clear. None of Ward's defenses of the Fourth Circuit's decision can justify its refusal to defer to the state agency.

Ward first claims that the DOI had no statutory authority to interpret a specific insurance contract provision. That contention is simply wrong. As explained in the petition and the supporting amicus briefs, South Carolina law grants the DOI broad regulatory authority over insurance policies sold within the State, *including an express statutory obligation to ensure that the terms of an insurance policy are unambiguous. See* S.C. Code Ann. § 38-61-20(A). Even under the Fourth Circuit's holding that the term "actual charges" is ambiguous, the DOI clearly would have had a statutory obligation under § 38-61-20 to disapprove the "actual charges" provision in Ward's policy. It is impossible to understand how Ward would have the DOI make such a decision if the DOI is not also permitted to *interpret* that provision.

As Ward correctly notes, "a regulatory body is possessed of ... those powers expressly conferred or

necessarily implied for it to effectively fulfill the duties with which it is charged." Opp. at 7 (quoting *Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 413 S.E.2d 13, 14 (S.C. 1991)). Here, the DOI has the statutory obligation to review and interpret insurance contracts in order to properly ensure that they do not contain ambiguous terms and insurers operating within the State are not committing violations of law by wrongfully denying claims or benefits. Where the DOI has exercised that statutory authority—in this case, by issuing opinion letters—that interpretation should be afforded deference. *See Johnson v. Beauty Unlimited Landscape Co.*, No. 4414, 2008 WL 2490449, at *1 (S.C. App. June 17, 2008); *see also South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control*, 610 S.E.2d 482, 486 (S.C. 2005).

Because Ward cannot seriously dispute that the DOI has the legal authority to interpret insurance contracts offered and sold within South Carolina, she also suggests that the Fourth Circuit's refusal to defer was proper because the DOI is not "a judicial body with the ability to resolve disputes of contractual interpretation." Opp. at 7. With all due respect, that is a non sequitur. Whether the South Carolina legislature has granted the DOI the authority to adjudicate insurance disputes is wholly irrelevant to the question at hand. The DOI did not purport to have formally adjudicated this dispute.

In a final attempt to defend the merits of the Fourth Circuit's decision, Ward contends that the DOI's longstanding interpretation is not owed deference because the opinion letters at issue were binding agency rulings. Ward's sole support for this

contention is that § 38-3-200 requires that for an order "of the director or his designee" to be effective, it must be "signed by the director *or by his* authority." Opp. at 8 (quoting S.C. Code Ann. § 38-3-200) (emphasis added). But that statute does not require that the Director himself sign an opinion letter for it to have legal effect. Instead, the clear statutory language provides that such a ruling is effective if it is made by the Director's "designee" and signed "by [the Director's] authority." S.C. Code Ann. § 38-3-200. It defies reason to say that an opinion letter signed by a DOI analyst, who is employed at the sole discretion of the Director, *id.* § 38-3-130, did not sign that letter "by [the Director's] authority," *id.* § 38-3-200. Ward's argument is simply too cute by half.[2]

It is also beside the point. The DOI has submitted no less than five amicus briefs (one in the district court, three in the Fourth Circuit, and one in support of this petition), each of which unequivocally affirmed and reiterated the DOI's longstanding interpretation of the term "actual charges." *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (Secretary of

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[2] Ward also attempts to rely upon *South Carolina Coastal Conservation League*, 610 S.E.2d at 486, in which she contends "the South Carolina Supreme Court ... declined to grant deference to opinion letters from agency staff." Opp. at 9. Not so. That decision involved an internal agency dispute about which agency regulation applied. The state Supreme Court held that "the [agency's appellate panel] not [agency] staff, is entitled to deference from the courts." *South Carolina Coastal Conservation League*, 610 S.E.2d at 486. There is no internal agency dispute here, and Ward has no support for her novel view of administrative law.

Labor's interpretation of regulation set forth in amicus brief was entitled to deference). The DOI's view could not be clearer or more consistent.

As early as 1999, three years before the DOI began investigating Ward's dispute with National, another DOI analyst issued an opinion letter expressing the same interpretation of "actual charges." App. 55a. Contrary to Ward's suggestion, therefore, the interpretation of "actual charges" by the DOI analyst assigned to the Ward investigation was not an isolated, dissenting opinion.[3]

The South Carolina Supreme Court's decision in *Sloan v. South Carolina Board of Physical Therapy Examiners*, 636 S.E.2d 598 (S.C. 2006), which Ward ignores, confirms that an agency's interpretation of the statute it is charged with administering deserves "the most respectful consideration[, which] should not be overruled absent compelling reasons," *id.* at 607—even where the agency interpretation at issue is "nothing more than a policy or guidance statement which does not have the force or effect of law in any individual case," *id.* at 610. In other words, *Sloan* stands for the proposition that even non-final agency policy statements deserve the courts' most respectful deference under South Carolina law.

Federal courts undermine sound principles of federalism and comity when they refuse to defer to a

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3 Ward attaches an affidavit from that analyst, suggesting that the analyst's opinion letter was uninformed. Opp. App. 1-3a. Even if true, the analyst's opinion letter hardly stands alone. The DOI has expressed the same interpretation in five amicus briefs, as well as in a 1999 opinion letter.

state insurance agency's well-reasoned determination of an issue of purely state law. This Court should either grant this petition for certiorari and review it on the merits, or grant the petition, vacate the Fourth Circuit's decision, and remand the action in light of § 38-71-242.

III. The Fourth Circuit's Interpretation Of The Term "Actual Charges" Will Have A Profound National Impact On The Ability Of Insurance Commissions To Regulate The Insurance Industry.

The Fourth Circuit's decision, if allowed to stand, will interpose a federal court's judgment for that of a state insurance commission on the meaning of an unambiguous insurance policy term. The amicus briefs supporting the petition make clear that it is not simply the meaning of the term "actual charges" that is at issue in this case. Instead, at issue is the fundamental role of federal courts in an area of law left expressly to the States. Congress has admonished that the insurance industry is best regulated by the States, *see* McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and insurance companies therefore rely upon state insurance commissions, their primary regulatory bodies, to provide certainty in the issuance of insurance policies.

The Fourth Circuit's decision decisively upsets this established regulatory system. It creates uncertainty surrounding any already-approved term of an insurance policy and introduces new risks that neither the state agency nor the insurance company can anticipate. As the amicus briefs explain, the Fourth Circuit's decision will have a profound national impact on the ability of state insurance

commissions to perform their regulatory obligations. This regulatory uncertainty threatens the welfare of consumers nationwide and the financial stability of the insurance industry, and warrants this Court's attention.

Ward has virtually no response, other than to suggest that the Fourth Circuit's decision "is limited by the geographical scope of this suit." Opp. at 11. But the amicus brief of the National Association of Insurance Commissioners rebuts this claim. The refusal to afford deference to one of the most fundamental responsibilities of a state insurance agency—the interpretation of insurance contract provisions—puts the insurance industry nationwide in an untenable position. It can no longer rely on commissions' approval of their policies in calculating risk and setting premiums. But risk calculations and premiums are critical to the health of the industry, and ultimately to the availability of insurance policies nationwide.

Ward does not challenge the fact that ignoring the expertise of a state agency can lead to unsound decisions that are totally at odds with the learned expertise of an agency. As the South Carolina legislature has made clear, the Fourth Circuit's decision not only introduces uncertainty but also fundamentally misunderstands modern medical billing practices. By declaring that the term "actual charges" can mean any amount a provider puts on an invoice, App. 9a-15a, the Fourth Circuit's decision assumes that patients are directly billed for medical services rendered. To the contrary, healthcare providers rarely bill a patient directly for services, but instead issue Explanations of Benefits. If insurance contracts are to have any meaning or

value, then unambiguous provisions must be interpreted to provide the coverage contracted for and approved by a state agency—no more and no less.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari and consider the Fourth Circuit's decision on the merits. Alternatively, the Court should grant the petition, vacate the Fourth Circuit's decision, and remand the case in light of S.C. Code § 38-71-242.

Respectfully submitted,

C. ALLEN FOSTER
KEVIN E. STERN
GREENBERG TRAURIG, LLP
2101 L St., N.W., Ste. 1000
Washington, D.C. 20037
(202) 331-3100

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 S. Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

J. CALHOUN WATSON
SOWELL GRAY STEPP & LAFFITTE, LLC
1310 Gadsden St.
P.O. Box 11449
Columbia, S.C. 29211
(803) 929-1400

SUSAN E. ENGEL
ELIZABETH M. LOCKE
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655 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 879-5000